BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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<tr><td>In the Matter of

Federal-State Joint Board on
Universal Service

1998 Biennial Regulatory Review – Streamlined
Contributor Reporting Requirements Associated
with Administration of Telecommunications
Relay Service, North American Numbering Plan,
Local Number Portability, and Universal Service
Support Mechanisms

Telecommunications Services for Individuals with
Hearing and Speech Disabilities, and the
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CC Docket No. 96-45

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CC Docket No. 92-237
NSD File No. L-00-72

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To: The Commission

COMMENTS OF ARCH WIRELESS, INC.

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SUMMARY

Arch Wireless, Inc. ("Arch"), a national provider of paging and messaging services, strongly urges the Commission to reject the proposed flat-fee, "per-connection" assessment methodologies proposed by the USF Coalition and Sprint. Adopting a flat-fee assessment mechanism would be arbitrary and capricious because it would be a radical departure from the Commission's long-held position against such flat-fee assessment mechanisms. Furthermore, assessment on a flat-fee basis is inequitable, discriminatory, and not competitively neutral due to the vast disparities that exist among the revenues generated "per-connection" for different types of carriers or services. Contrary to public policy, assessment on a flat-fee basis is also inaccurate and an unnecessarily burdensome and costly process. Moreover, adoption of the per-connection charges proposed by the USF Coalition and Sprint would be unlawful because these rates are unsupported by sufficient evidence. While flaws admittedly exist in a revenues-based system, a revenues-based mechanism is still the best solution given the more numerous problems that would be introduced by a flat-fee, per-connection assessment methodology. In fact, the *only* way to set a lawful per-connection charge would be based on carrier revenues. Should the Commission rightly decide to reject the per-connection proposals, the Commission should modify the existing revenue-based system to permit carriers to elect projected or current revenues as an alternative to historical revenues. In the event the Commission decides to adopt a connection-based mechanism, however, it should not adopt a per-unit charge for paging carriers that is any higher than the current average of $0.07 per pager.

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To: The Commission

COMMENTS OF ARCH WIRELESS, INC.

Arch Wireless, Inc. ("Arch"), a national provider of paging and messaging services, hereby submits its comments in response to the Commission's *Further Notice of Proposed Rulemaking* ("*FNPRM*") regarding the reform of the current universal service contribution mechanism.[1] Arch strongly urges the Commission to reject the proposed flat-fee, "per-

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[1] *Federal State Joint Board on Universal Service; 1998 Biennial Regulatory Review; Telecommunications Services for Individuals with Hearing and Speech Disabilities; Administration of the North American Numbering Plan; Number Resource Optimization;*

connection" assessment methodologies proposed by the USF Coalition and Sprint. Adopting a flat-fee assessment mechanism would be a radical departure from the Commission's long-held position against such flat-fee assessment mechanisms and would thus be arbitrary and capricious. Furthermore, Arch reminds the Commission that assessment on a flat-fee basis is inequitable, discriminatory, and not competitively neutral. Assessment on a flat-fee basis is also inaccurate and an unnecessarily burdensome and costly process. Moreover, adoption of the charges proposed by the USF Coalition and Sprint is unlawful because these rates are unsupported by sufficient evidence and, thus, lack a rational basis. Therefore, the Commission should retain the current revenue-based approach, but should use current or projected revenues to protect the interests of carriers with declining revenues. In the event the Commission decides to adopt a connection-based mechanism, however, it should not adopt a per-unit charge for paging carriers that is any higher than the current average of $0.07 per pager.

I. Adopting a Flat-Fee Assessment Methodology Would Be Arbitrary and Capricious Based on Commission Precedent

It is well settled that "an agency acts arbitrarily and capriciously when it abruptly departs from a position it previously held without satisfactorily explaining its reasons for doing so. Indeed, where an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious."[2] Moreover, "[a]n agency interpretation of a

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Telephone Number Portability; Truth-in-Billing and Billing Format, Further Notice of Proposed Rulemaking, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, FCC 02-43 (rel. Feb. 26, 2002)("*FNPRM*"). Although for the sake of brevity these reply comments only touch on some of the issues that Arch raised in its initial comments, Arch maintains its position on all of the issues it raised in those initial comments.

[2] *Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 738, 748 (D.C. Cir. 2001) (emphasis supplied).

relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view."[3]

In this proceeding, the Commission repeatedly has declined to adopt non-revenue-based universal service assessment methodologies because such methodologies are administratively burdensome, discriminatory and not competitively neutral. In 1996, the Commission stated that a flat-fee approach would require the FCC to develop "equivalency ratios" for "calculating contributions owed by providers of services that were not sold on a per-line or per-minute basis into their respective per-line or per-minute units. In addition, these [non-revenue-based] approaches may favor certain services or service providers over others."[4] The Joint Board agreed, stating that flat-fee mechanisms "would require the Commission to adopt and administer difficult 'equivalency ratios' . . . In addition, these approaches may favor certain services or providers over others."[5]

In 1997, in adopting a revenue-based assessment, the Commission again rejected proposals that contributions be calculated on a per-minute or per-line basis. The Commission affirmed the Joint Board's earlier reasoning, citing the administrative difficulty of establishing equivalency ratios, and the lack of "competitive neutrality" of these systems.[6]

The proposed connections-based methodology is at root no different from the methodologies that the Commission has previously rejected. In the *FNPRM,* however, the

3 *INS v. Cardozo-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

4 *Federal-State Joint Board on Universal Service*, Notice of Proposed Rulemaking and Order Establishing Joint Board, 11 FCC Rcd 18092, 18147-48, ¶ 124 (1996).

5 *Federal-State Joint Board on Universal Service*, Recommended Decision, 12 FCC Rcd 87, 496 ¶ 812 (1996).

6 *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9210 ¶ 852 (1997).

Commission seeks to avoid this necessary conclusion by suggesting that the connection-based approach, unlike other flat-fee methodologies, is permissible because it would not require the Commission to calculate equivalency ratios.[7] The Commission's effort to distinguish the current connections-based methodology from earlier proposals is, however, inadequate. Instead, the Commission has merely excluded from the contribution base the primary set of carriers that do not sell service on a per-line basis and for whom equivalency ratios would have to be established – IXCs. In addition, the USF Coalition proposal calls for an elaborate system to determine the charge for multi-line business users that looks remarkably like an equivalency ratio system.

In sum, the Commission has consistently stated that a flat-rate assessment would favor certain services or service providers over others and, therefore, must now offer a strong justification to reverse its position. For the reasons discussed in the sections below, Arch submits that the Commission can offer no such justification.

II. Assessment on a Flat-Fee Basis is Inequitable, Discriminatory, and Not Competitively Neutral

In both its initial comments and reply comments in this proceeding, Arch argued that an assessment mechanism based on a flat-fee charge would violate the guiding principles of the universal service system that carrier contributions be "equitable and nondiscriminatory" because vast disparities exist among the revenues generated "per-connection" for different types of carriers or services.[8] In this regard, Arch notes that any assessment methodology *must* account

[7] *FNPRM* ¶ 44.

[8] *See* Arch Comments at 5; Arch Reply Comments at 3; 47 U.S.C. § 254(b)(4).

for a carrier's relative ability to pay under Section 254(d).[9] Thus, any flat-fee charge will necessarily need to be a function of carrier revenues.

Even the USF Coalition and Sprint have been forced to incorporate this fact into their "per-connection" proposals. Why else does the USF Coalition propose a monthly $1.00 charge per wireline or wireless connection and a $0.25 charge per pager if not to acknowledge the three- to fourfold difference in monthly revenues between paging carriers and telephony providers? Sprint's proposal goes even farther by expressly recognizing the necessity of basing the flat-rate fee on a carrier's ability to pay – Sprint's proposal sets the flat-rate amounts for the different industry segments based on the current burden imposed by the revenue-based system. As Arch has previously recognized, it is nonsensical to switch to a flat-rate assessment system when any flat-rate assessment process will ultimately need to be based on revenues in order to be equitable, non-discriminatory, and competitively neutral.[10]

III. Assessment on a Flat-Fee Basis is Contrary to Public Policy Because the Process is Inaccurate and Implementation will be Burdensome and Costly

The Commission has recognized that there are numerous practical problems with the implementation of a flat-fee universal service charge. As discussed above, the Commission initially rejected the adoption of non-revenues-based measures because such mechanisms would require the use of difficult "equivalency ratios," which the Commission concluded are not competitively neutral because they risk favoring certain services or providers if the ratios are "improperly calculated or inaccurate."[11] Similarly, the factors used in the USF Coalition and

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9 *See* 47 U.S.C. § 254(d); *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 434 (5th Cir. 1999)("Obviously, the language [in Section 254(d)] also refers to the fairness in the allocation of contribution duties.").

10 *See* Arch Comments at 6.

11 *Federal-State Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9210, ¶ 852 (1997). *See also Federal-State Board on Universal Service*, Recommended Decision, 12

Sprint proposals are difficult to administer and at least equally likely to produce inaccurate results. As discussed in greater detail in Part IV, below, the USF Coalition's proposal without question favors interexchange carriers at the expense of all other carriers on the basis of charges that are unsupported by the evidence in this proceeding. The calculations used in the USF Coalition's proposal to determine contributions for multi-line business are particularly susceptible to error due to their complexity and the small likelihood that the three broad capacity tiers accurately reflect the interstate traffic carried by individual businesses.

Of particular importance to Arch as a paging carrier is the omission of the paging industry as a distinct industry segment in Sprint's proposal – under the wireless category, Arch's contributions would be assessed on the basis of a 15 percent interstate allocator, inexplicably above its current 12 percent safe harbor.[12] As Arch has noted, the paging safe harbor was set based on actual carrier data, and there have been no trends in *paging* service to suggest any change in interstate usage since that time.[13]

The *FNPRM* touts the per-connection assessment method as the solution to the "problems" of the revenue-based system, but the proposal creates far more problems than it solves. The Commission has recognized that a connection-based assessment methodology could result in a host of significant difficulties, including: (1) increasing the contribution obligations for certain industry segments, namely the wireless and paging industries; (2) increasing the

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FCC Rcd 87, 496, ¶ 812 (1996); *Federal-State Board on Universal Service*, Notice of Proposed Rulemaking and Order Establishing Joint Board, 11 FCC Rcd 18092, 18147-48, ¶ 124 (1996).

[12] *FNPRM* ¶ 60 n.150. While Sprint's approach is more palatable to wireless carriers generally because they would pay $0.46 a month, roughly what they currently pay, the degree of computation necessary to arrive at contribution amounts under this system is significant and adds an unnecessary level of complexity to the current revenue-based methodology. *See id.*

[13] *See* Arch Comments at 2-3; Arch Reply Comments at 3-4.

contribution obligations for connections provided to certain categories of customers, namely low-volume and low-income users; (3) increasing the frequency of the reporting obligation from quarterly to monthly; and (4) creating a new set of untested definitions to address rapidly evolving technology.[14]

The Commission has also stated that the per-connection charges will be frozen for a "specified period of time," but has not proposed how long this timeframe will be or how the rates will be altered.[15] This inadequacy threatens to introduce numerous additional complexities and challenges to the assessment process in the future. Furthermore, the Commission should note that implementing a per-connection assessment mechanism will require many contributors to modify their accounting and billing systems in order to manage the necessary data, a potentially costly and burdensome undertaking. Thus, a per-connection assessment method will not reduce the number or type of problems associated with the current revenue-based system and is likely to create even more.

IV. The USF Coalition and Sprint Proposals Lack a Rational Basis

On average, Commission staff has estimated that mobile wireless providers (excluding paging providers) currently contribute approximately $0.46 per connection, paging providers currently contribute approximately $0.07 per pager, and local exchange and interexchange carriers contribute approximately $1.29 per residential connection.[16] However, the USF Coalition's proposal has, apparently randomly, selected a charge of $1.00 per connection for fixed and wireless carriers and a charge of $0.25 for paging carriers – a radical departure from current contributions amounts, which fairly represent the percentage of interstate traffic carried

[14] *See id.* ¶ 73.

[15] *See id.* ¶ 38.

[16] *See id.* ¶ 59.

by the various industry segments. Sprint's proposal estimates an assessment of $2.01 per month for each fixed connection and $0.46 for each mobile connection, including paging, based on its own unverified estimates of each industry's percentage of interstate traffic.[17]

While the Commission staff has estimated that residential customers might pay roughly the same recovery fees *on average* under the USF Coalition's proposal as they do under the current methodology, this apparent equity is entirely irrelevant to the inequity of shifting the burden for universal service contributions away from interexchange carriers to wireless service providers out of proportion to their interstate revenues.[18] Importantly, the staff's analysis "*assumes* that, under a connection-based assessment system, both residential connections and mobile wireless connections (excluding pagers) would be assessed $1.00, and pager providers would be assessed $.25 per pager."[19] This analysis openly fails to provide a rational justification for the proposed charges.

Furthermore, the Commission has not made *any* visible attempt to justify the USF Coalition's or Sprint's proposed assessment amounts. It is a well-established principle that, as an expert agency, the FCC must make "informed and rational" decisions.[20] Conclusory justifications are insufficient.[21] Therefore, the FCC cannot exercise "near-total deference" to the USF Coalition's or Sprint's figures without impermissibly abdicating its role as the rational

[17] *See id.* ¶ 60.

[18] *See id.* ¶ 46.

[19] *Id.* (emphasis supplied).

[20] *See Qwest v. FCC*, 258 F.3d 1191, 1202 (10th Cir. 2001)(finding the FCC did not make an informed and rational choice by identifying "some range" and then picking a "compromise figure").

[21] *See id.*

decision-maker[22] – a mistake it has made previously in this difficult proceeding.[23] Absent exercise of independent judgment, the Commission's adoption of the USF Coalition's $1.00 and $0.25 proposed per-connection charges (as well as Sprint's approximate $2.01 and $0.46 charges) would be arbitrary and capricious. Because there is no evidence of rational decision-making, the proposed charges are unlawful.

In fact, Arch submits that there is *no* reasonable basis for setting connection-based charges that will be rational and equitable. Any per-connection charge is bound to be arbitrary and subject to serious risk of judicial rejection. Indeed, the only rational and reasonable way to set a per-connection charge would be based on carrier revenues. However, if the Commission is going to set per-connection charges based on carrier revenues, it might as well simply retain a revenue-based assessment mechanism.

V. Even If a Connection-Based Assessment is Adopted, the Proposed $0.25 Assessment on Paging Carriers Is Far Too High

As described above, a connection-based assessment methodology would be illegal as well as bad policy. If the Commission nevertheless adopts a connection-based assessment, however, the per-unit charge for paging carriers should be well below the proposed $0.25.

Paging carriers' average revenue per unit is approximately $8,[24] while the average bill for a landline connection is $53.[25] Thus, under the proposal in the *FNPRM*, paging customers would

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[22] *See Texas Office of Pub. Util. Council v. FCC*, 265 F.3d 313, 328 (5th Cir. 2001)(finding the FCC did not provide an explanation as to why it found one study more persuasive than another in establishing the $650 million amount for the Universal Service Fund).

[23] *See Qwest v. FCC*, 258 F.3d 1191 (10th Cir. 2001).

[24] *See In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Fifth Report, 15 FCC Rcd 17660, 17774 (2000). The Commission's year 2001 sixth report includes only an unweighted average of one-way and two-way paging revenues, which are not comparable.

pay 3.1% on average, while landline customers would pay 1.9% on average. Moreover, these figures do not even account for the jurisdictional character of the revenue. As the Commission has recognized, paging carriers currently pay approximately $0.07 per pager on average.[26] There is no basis to increase this amount by more than 300% in switching to a connection-based assessment.

As Arch previously has noted, paging carriers' current safe harbor percentage was set based on actual paging carrier data submitted before a safe harbor was adopted.[27] Because paging carriers do not offer long distance services and cannot "bundle" them with other services, paging carriers are not affected by any bundling trends that may affect other CMRS providers.[28] Therefore, there is no reason to believe that paging carriers' interstate revenues have changed since the safe harbor was adopted. Particularly in light of the fierce intermodal competition that paging carriers now face, the average contribution for paging carriers should not rise above the current $0.07 per-unit figure, even if a per-connection assessment mechanism is adopted, in order not to hobble paging carriers relative to their intermodal competitors.

VI. A Revenue-Based Approach Should Use Current or Projected Revenues

Should the Commission rightly decide to reject the USF Coalition's and Sprint's per-connection proposals, the Commission should modify the existing revenue-based system to permit carriers to elect projected or current revenues as an alternative to historical revenues.

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25 *See* INDUSTRY ANALYSIS DIVISION, FEDERAL COMMUNICATIONS COMMISSION, TRENDS IN TELEPHONE SERVICE Table 3.2 (2001). These data show average household monthly expenditures for local service of $35 and for long distance service of $18. Because the per-line assessment would apply to the "connection" that provides access to both local and long distance services, both revenues must be included for a correct comparison.

26 *See FNPRM* ¶ 59.

27 *See* Arch Comments at 2-3; Arch Reply Comments at 3-4.

28 Arch has no information about revenue trends affecting other CMRS carriers and expresses no view or opinion regarding the jurisdictional character of other carriers' revenues.

Both the current or projected revenues methodologies would address the concern that reliance on historical revenue benefits new entrants and contributors with increasing revenues, while simultaneously disadvantaging contributors with declining revenues. For example, using historical revenues, a new entrant is able to spread its costs associated with universal service over a larger revenue base than that on which the costs were based. Conversely, a carrier with decreasing revenues is forced to spread its costs over a smaller revenue base. Thus, new entrants and contributors with increasing revenues are able to offer artificially low prices and place other carriers at an unjust competitive disadvantage.

As a solution to this problem, Arch proposes that the Commission permit carriers to elect to assess their universal service contributions based on *either* projected or historical revenues.[29] By requiring carriers to elect projected or historical revenues over a relatively long, fixed interval, such as 24 months, carriers would be prevented from jumping back and forth between historical and projected revenues, and the Commission's concerns about potential "gaming" under a projected-revenue system would be eliminated. Also, there is no reason to believe that projected revenues would fluctuate any more than historical revenues if they are based on solid trend data.[30]

Furthermore, there is no reason to suspect that use of projected revenues will erode the contribution base over time as long as USAC continues to adjust the contribution factor based on the reported data. While a projected-revenue system would not address the existing mechanism's inability to make regulatory distinctions between interstate/intrastate and telecommunications/non-telecommunications revenues, given the more numerous problems that

[29] Allowing some carriers to rely on historical data will not disadvantage carriers with declining revenues as long as the option to elect projected revenues is also available. The same holds true for the use of current revenues.

[30] *See FNPRM* ¶ 85.

would be introduced under a flat-fee, per-connection system, a revenue-based mechanism is unquestionably preferable. In spite of its flaws, a revenues-based system is still the best solution.[31]

In the alternative, the Commission should permit carriers to elect to assess their universal service contributions based on *either* current or historical revenues. A mechanism based on current revenues would afford carriers the same benefits as a projected-revenues system. Plus, the Commission's concerns regarding the use of current revenues are unfounded. By giving carriers the choice between current or historical revenues, the monthly reporting requirement associated with a current-revenues system would not be imposed on any unwilling or unable carriers – rather, carriers would knowingly assume this obligation as a trade-off for the benefits offered by the system. Any potential shortfall in the universal service fund would also be avoided through USAC's appropriate adjustment of the contribution factor.[32]

As the revenue base for paging carriers has been gradually declining and the paging industry has been facing increasing intermodal competition, the Commission should reaffirm its commitment to this valuable communications service by removing the universal service process as an obstacle to fair competition. The Commission should modify the revenue-based assessment method to permit carriers to elect current or projected revenues as an alternative to historical revenues.

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[31] *See id.* ¶ 86.

[32] *See id.* ¶ 87.

CONCLUSION

For the reasons discussed above, Arch urges the Commission to reject the flat-fee, per-connection assessment proposals and adopt a revenue-based approach using current or projected revenues. Although a revenue-based assessment may not be perfect, it remains considerably less problematic than any other proposal that has been presented in this proceeding.

Respectfully submitted,

By: /s/

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